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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEMAR RANDALL, Defendant and Appellant.	A107279 (Sonoma County Super. Ct. No. 33893)

Appellant Lemar Randall was convicted of second degree robbery, and sentenced to three years in prison. He contends we must reverse his conviction because the prosecutor committed misconduct during argument to the jury, or alternatively because he received ineffective assistance from his own defense counsel. We disagree, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At 10 a.m. on March 2, 2004, Dana Devon was employed collecting quarters from electronic video games at an arcade in Rohnert Park when he heard the sound of "jingling coins." He turned and saw two men in the vicinity, one of whom—later identified as appellant—was walking rapidly away while using his jacket in an apparent attempt to conceal several bags of coins. Devon pursued appellant outside the arcade entrance, catching up to him by the time he reached a truck in the parking lot. As appellant opened the driver's side door of the truck, Devon tried to grab the coin bags back. As he struggled with appellant over the bags, the second man reached the truck and got in the passenger side. During the struggle, Devon was able to look at appellant in the face

"[r]eal close up and personal," and noticed that his eyes "were very different, expressive." Appellant ripped the bags away from Devon's grasp, and Devon grabbed the open driver's side door of the truck. Appellant, a "big fellow" who appeared to weigh about 280 pounds, charged Devon "like a football block," and knocked him to the ground. Devon got up, ran to the front of the truck, and yelled that he had appellant's license number and appellant would be "going to jail." Devon memorized the license plate number as the two men in the truck stared fixedly at him. Appellant then backed out of the parking lot and drove away.

Devon called 911 and reported the robbery. He provided the police with the license number of the truck and described the robber as a black man weighing about 280 pounds. Rohnert Park police identified the license plate as belonging to a truck registered to appellant. Devon subsequently identified appellant's pickup truck as the vehicle used in the robbery. Devon identified appellant from a photographic lineup immediately and without hesitation, telling the police he recognized appellant's eyes, which looked "unique" to Devon. Devon also identified appellant at the preliminary hearing and at trial. Devon was "certain" appellant was the robber the moment he saw him in the courtroom; "[he] knew that's exactly the person who [he thought] it [was]," with "[n]o" doubt in his mind.

Appellant claimed to have been sleeping in bed at his home in Richmond at the time of the incident, and specifically denied being in Rohnert Park on March 2, 2004. He did not deny owning the truck identified by Devon, and it was undisputed at trial that it was his truck that was used in the robbery. His principal defense was that other members of his family—specifically, his sister and three brothers—had access to his truck keys, and occasionally used his truck without telling him about it. All three of appellant's brothers were taller than he, and two were also thinner.

Appellant was arrested on March 3, 2004. At the time, he had $200 in $20 bills on his person. Appellant was not employed at the time, and he had been out of work for six months. On redirect examination, appellant testified that the cash he had on his person at the time of arrest came from a $600 income tax refund, which he had received sometime

around January 20, 2004. Appellant also testified that he had won about $200 at a casino on January 30, 2004.

Appellant was charged with robbery by means of force or fear. At the conclusion of trial, the jury returned a verdict finding him guilty as charged. The trial court denied probation, and sentenced appellant to the midterm of three years, with appropriate credits. This appeal followed.

PROSECUTORIAL MISCONDUCT

Background

Appellant's principal contention is that the trial court violated his constitutional rights by failing to instruct the jury that the prosecutor had engaged in misconduct during closing argument. At issue are the prosecutor's comments about the cash found on appellant's person at the time of his arrest, and specifically the following remarks: "[Appellant] wants you to believe that he had money from a tax refund in January, January 20th, which is phenomenally early for a tax refund. But he does, he gets 600 bucks, according to him, back for a tax refund, if you believe he gets his tax refund back in January, which is also uncorroborated. [¶] . . . [¶] So [appellant] says he gets $600 in a tax refund, and he still has 280 of it in his pocket two months later, in twenties, when he's arrested. It doesn't make sense, and it isn't a reasonable explanation of that money."[1]

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[1] The prosecutor's entire argument on this point was as follows: "[Appellant] has 280 bucks in 20-dollar bills in his pocket. What's the significance of that for the People's case? Well, if you're stealing hundreds of dollars in quarters, we all know there's this thing called coin stars at grocery stores. You dump the quarters in, and you get cash out, and you get them in twenties. But the defendant [appellant] wants you to believe that he had money from a tax refund in January, January 20th, which is phenomenally early for a tax refund. But he does, he gets 600 bucks, according to him, back for a tax refund, if you believe he gets his tax refund back in January, which is also uncorroborated. [¶] . . . [¶] So [appellant] says he gets $600 in a tax refund, and he still has 280 of it in his pocket two months later, in twenties, when he's arrested. It doesn't make sense, and it isn't a reasonable explanation of that money. [¶] On the whole, I felt, when listening to [appellant's] testimony, he wasn't saying anything. He wasn't explaining anything or giving us any concrete alibi with any corroborating evidence to it. And that's because he can't -- simply cannot explain his truck being at the scene of the crime. And that really is outside of the $280 in his pocket."

Defense counsel moved outside the jury's presence for a mistrial on the ground the prosecutor had committed misconduct by questioning the veracity of appellant's testimony about receiving a $600 tax refund in January despite her knowledge of the existence of documentary evidence supporting appellant's claim. The evidence in question had been discussed at a pretrial in limine hearing, but never admitted because of lack of proper foundation.[2] As an alternative to mistrial, defense counsel asked the trial court to instruct the jury that appellant "did, in fact, receive . . . a tax refund in late January of 2004 in the amount of $600." In response, the prosecutor averred that she had seen only one of the documents in question—a letter from a tax preparer identified as court exhibit 4—which itself contained nothing to indicate *when* appellant would receive his refund. She maintained that the thrust of her argument to the jury had been not so much to question appellant's contention that he had received a tax refund in January, as that he still had so much of it in cash on his person at the time of his arrest almost two months later. The trial court considered defense counsel's request for a jury admonition, but continued the hearing on the mistrial motion.

After completion of closing arguments, the court resumed the hearing on appellant's mistrial motion. Defense counsel again argued that the prosecutor's remarks in closing argument had amounted to misconduct because they asked the jury to draw an inference that appellant was lying about receiving a tax refund in January 2004, contrary to evidence assertedly known by the prosecutor. The trial court noted that defense counsel had been given the opportunity to provide a proper foundation for the admission of the subject documents, but did not do so; the prosecutor was never provided with the

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Although the evidence shows appellant had $200 in his possession, appellant does not challenge as misconduct the prosecutor's factual misstatement on this point.

[2] The documents are in the augmented record on appeal. They consist of a five-page document labeled court exhibit 3, consisting of a fax cover sheet, a copy of an IRS e-file signature authorization form, a truth-in-lending disclosure and itemization statement, a "taxpayer information form," and a copy of appellant's form W-2; and a one-page document labeled court exhibit 4, consisting of the first page of a letter dated January 23, 2004, addressed to appellant from Jackson Hewitt Tax Service.

document identified as exhibit 3, which assertedly showed that appellant had received the tax refund money[3]; and the document that the prosecutor did see—i.e., the January 23, 2004, letter identified as exhibit 4—did not specifically state when appellant was to receive his tax refund money.[4] The trial court explained: "I think this goes to the argument that this is prosecutorial misconduct. And the reason I think there's a distinction to be made that's important is . . . , first of all, the Prosecutor was not necessarily aware of the document that would have clearly indicated the time and amount of the refund, if indeed there was one." At that point, the prosecutor stated that the inference appellant was being untruthful about receiving his tax refund as early as January was not an unreasonable one, particularly since appellant never properly offered any documentary evidence as to when he got his refund; it was not misconduct for her to have implied in closing argument that it was unlikely for appellant to have received a tax refund as early as January; and defense counsel had "ample opportunity" in his closing

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[3] In fact, the documents not shown to the prosecutor, identified as court exhibit 3, appear to indicate that appellant may have received a high interest "refund anticipation loan" against his anticipated tax refund. Even on this form, it is not clear when, or indeed even if, appellant received the proceeds of the referenced refund anticipation loan.

[4] The trial court stated: "[T]o start with, the writing, the Jackson Hewitt letter, . . . does not state specifically that they're sending him the money." The trial court went on to characterize the letter from appellant's tax preparer as having been "really a statement to [appellant] that if he uses the Jackson Hewitt [tax preparation] services, he would be entitled to a refund," and "an offer to have [appellant] send in his tax information to allow them to go forward with the tax preparation." Defense counsel agreed, stating "I believe that's a fair characterization of the letter."

Both the trial court and defense counsel appear to have misread the letter in making this latter characterization. In fact, the letter (court exhibit 4) thanks appellant "for allowing Jackson Hewitt Tax Service to prepare your income tax return this year," specifically states that appellant's return had already been electronically filed, and sets forth the anticipated amounts of both appellant's federal and state tax refunds. The letter also offers to send appellant $10 in cash for each "new customer" he referred to Jackson Hewitt for tax preparation. On the other hand, the letter did *not* show that appellant received any refund in January 2004; it simply showed that his tax return was electronically filed at that time, and he could look forward to receiving a refund as a result.

argument to respond with an alternate inference that appellant got his tax refund early because he filed early.

After reviewing cases cited by the parties, the trial court ruled there had been no prosecutorial misconduct. The court found there was "no evidence indicating that the Prosecutor was provided with or shown documents that . . . clearly indicate [appellant] had . . . actually received his tax refund in January of 2004, or frankly at any time." Citing defense counsel's failure to introduce the relevant documents into evidence, the court also found the prosecutor's comments about the likelihood of appellant having received a tax refund as early as January were not improper, but instead represented a fair and reasonable comment on the testimony in light of "common experience."[5] On this

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[5] "The Court's prepared to rule as follows: To repeat, the Court finds there is no prosecutorial misconduct in this case. The Court does not believe, or at least has no evidence indicating that the Prosecutor was provided with or shown documents that were -- clearly indicate the defendant had received his -- actually received his tax refund in January of 2004, or frankly at any time.

"To the extent that there may have been some vague reference to additional documents which were not shown to the Court, and as to which there was no evidence shown to the People that reference being made during the course of the trial and in pretrial stages, the Court does not believe that is sufficient to justify an inference or finding that there is prosecutorial misconduct, and that motion is denied, and that finding is made.

"The Court denies the Defense motion for a mistrial at this time, for the reasons stated.

"With respect to the final argument of the Defense as to improper argument of counsel, the Court believes that the Defense certainly could have introduced evidence, had it chosen to do so, going to the weight of the evidence as to whether or not there was a tax refund and the extent to which the refund was made or the amount of the refund and the date of the refund.

"The Defense obviously introduced evidence regarding that through the evidence—had an opportunity to introduce additional evidence, and obviously chose not to do so. The Court is not second guessing or evaluating the Defense decision. It could be biased. Many reasons. But plain and simple, it was not . . . introduced into evidence, it was not offered into evidence, and it was not offered to the Court, and apparently was not offered to the Prosecutor.

"With respect to the argument made by the Prosecutor regarding the tax refund, the Court believes that issue is one that the jury can consider in evaluating the testimony of the defendant in this case and either accept it or not accept it. The Court believes, therefore, the argument of counsel was not improper, and denies the motion.

"I should state that upon close consideration with respect to the one issue raised by the Court, which is whether or not -- the issue of whether the return was phenomenally early,

basis, the trial court denied the motion for a mistrial and declined to give any admonition to the jury on the issue.

Discussion

Appellant insists the trial court denied his constitutional rights to due process and a fair trial by denying his motion for mistrial, or alternatively failing to give an instruction admonishing the jury that the prosecutor had engaged in misconduct by suggesting that appellant was lying about receiving a tax refund. Appellant is wrong.

The initial question is whether the conduct complained of was actually misconduct. In general, a prosecutor's behavior constitutes prosecutorial misconduct only when it either (a) presents a pattern of conduct so egregious as to infect the trial with such unfairness as to make the conviction a denial of due process; or else (b) involves the use of deceptive or reprehensible methods in an attempt to persuade either the court or the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Van Houten* (1980) 113 Cal.App.3d 280, 292.) A prosecutor is generally given wide latitude to argue his or her case. Prosecutorial argument may be vigorous, so long as it amounts to fair comment on the evidence, including reasonable inferences or deductions which may be drawn therefrom. During closing argument, a prosecutor may state matters not in evidence which are common knowledge or are illustrations drawn from common experience. (*People v. Hill, supra,* 17 Cal.4th at p. 819; *People v. Williams* (1997) 16 Cal.4th 153, 221.) The standard for reviewing prosecutorial remarks or comments to determine misconduct is whether there is a reasonable likelihood the jury misconstrued or misapplied the prosecutor's words in violation of the United States or California Constitutions. (*People v. Clair* (1992) 2 Cal.4th 629, 662-663.) Even if genuine

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the Court believes that is a matter of common experience to the extent it can be considered by the jury and, therefore, will find it's reasonable in light of the evidence that was presented."

misconduct is established, the ultimate question in each case is whether it is reasonably probable that a result more favorable to the defendant would have occurred in the absence of such misconduct. Criminal trials are rarely perfect, and we will not reverse a judgment unless upon a consideration of the entire record, we determine that the misconduct resulted in prejudice amounting to a miscarriage of justice. (*People v. Hill, supra,* 17 Cal.4th at pp. 844-845.)

The trial court was correct in concluding that the prosecutorial argument at issue in this case did not constitute misconduct. The record shows that appellant specifically testified the $200 in cash he had on his person at the time of his arrest on March 3, 2004, was from a $600 tax refund he had received on or about January 20, 2004. In closing argument, the prosecutor commented on this testimony by opining that January 20 was "phenomenally early for a tax refund"; that appellant's claim of receiving a tax refund in January was "uncorroborated"; and that his claim that he still had a large portion of it in his pocket almost two months later "doesn't make sense, and . . . isn't a reasonable explanation of that money."

None of these statements was a misstatement of the record or otherwise deceptive or untrue. To the contrary, they were fair comments on the evidence in the form of reasonable inferences or deductions which could be drawn therefrom. The statement that January was "phenomenally early for a tax refund" was based on common knowledge or experience, and thus was an observation the prosecutor was entitled to make. (*People v. Hill, supra,* 17 Cal.4th at p. 819.) The only thing in evidence on appellant's January receipt of a tax refund was appellant's own testimony; the prosecutor was therefore correct in stating that the claims was "uncorroborated." Contrary to appellant's assertions, the unadmitted exhibits contain no evidence that appellant actually received a tax refund in January.[6] In any event, the fact these documents were not in evidence was

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[6] Thus, court exhibit 3 appears to evidence appellant's electronic filing of his 2003 tax return, and his request for a "refund anticipation loan," apparently dated January 24, 2004. However, this "exhibit" does not show that appellant actually received this money, on that or any other date. Moreover, the record indicates the prosecutor did not actually see this exhibit until *after* the defense motion for a mistrial. Court exhibit 4, the letter

entirely the responsibility of the defense, which could have offered to authenticate and introduce them formally into evidence at trial. Finally, the prosecutor's denigration of appellant's explanation for the large amount of cash on his person as unreasonable was simply fair comment on the testimony, consideration of which was ultimately for the jury. There is no reasonable likelihood the jury misconstrued or misapplied these comments in violation of appellant's constitutional rights. There was no prosecutorial misconduct, and the trial court did not err either in concluding that the prosecutor's argument was entirely reasonable, or in refusing to give any jury admonition thereon.

INEFFECTIVE ASSISTANCE OF COUNSEL

Anticipating that we would conclude the trial court did not err in refusing to find prosecutorial misconduct on this record, appellant makes a claim of ineffective assistance of counsel, based on the failure of trial defense counsel to lay a foundation for presentation of the documentary evidence purportedly supporting appellant's receipt of a tax refund in January 2004. The claim is meritless.

In order to prevail upon a claim of ineffective assistance of counsel, appellant "must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or

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from appellant's tax preparation service and the only document the prosecutor had actually seen before her closing argument, simply informs appellant of the fact his return had been electronically filed, and the amount of the refunds he could *anticipate* receiving. Nowhere does the letter give any indication when or how appellant might receive his refund. Moreover, the fact the letter was dated January 23—three days after the date appellant claimed to have received his refund—is strong evidence appellant did not receive his tax refunds until the last week of January *at the very earliest.* On this record, the prosecutor's observation that such a rapid refund would be "phenomenally early" was nothing more than a statement of fact.

unless there simply could be no satisfactory explanation . . . .' [Citation.] Finally, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333; *Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Here, where appellant makes this claim on appeal and not by writ, there is no showing whatsoever that trial defense counsel has been asked for an explanation of his failure to seek the admission of the subject evidence. We therefore must find no ineffective assistance of counsel, unless the record *affirmatively discloses* either that counsel had no conceivable rational tactical purpose for this failure, or that there could not be any other satisfactory explanation for the omission. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980; *People v. Bolin, supra,* 18 Cal.4th at p. 333.)

That is not the case here. The record shows defense counsel actually made the effort to procure documentary evidence of appellant's tax refund; the problem was that these materials were never authenticated for formal admission. Counsel's failure to offer this authenticating evidence may have been based on the difficulty and expense of securing such authentication. Even assuming the documents *could* have been authenticated to make them admissible, counsel's failure to do so could rationally have been based on his tactical conclusion that taking the time to call the necessary authenticating witnesses for the introduction of this relatively tangential evidence would have risked alienating the jury and weakening the rest of appellant's defense.

Moreover, it is not reasonably probable the jury would have reached a verdict more favorable to appellant in the absence of appellant's alleged incompetence. At worst, counsel's failure to secure the introduction of this documentary evidence permitted the prosecutor to cast doubt on whether appellant received a tax refund as early as January. Even if appellant had introduced sufficient corroborating evidence to convince the jury that appellant did get his refund in January, it would have had no effect on the actual thrust of the prosecutor's argument; namely, that even if the jury believed

appellant's claim to have received $600 in January it was unlikely he would still have been carrying $200 of that amount on his person, in cash, almost two months later. In any event, this evidentiary issue pales in significance beside the overwhelming evidence of appellant's guilt, based on the victim's report of appellant's license plate number within minutes of the crime, the undisputed use of appellant's truck in the robbery, and the victim's immediate identification of appellant from a photographic lineup and complete certainty that appellant was the perpetrator based on his opportunity to observe appellant's features in broad daylight and at close proximity.

DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Pollak, J.